FRANCES KUNKEL

IBLA 83-500 Decided August 22, 1983

Appeal from the decision of the Oregon State Office of the Bureau of Land Management rejecting lessee's attempt to withdraw her interest in five issued oil and gas leases and to recover the advance annual rental paid for each. OR-27817 (WA), OR-27821 (WA), OR-27676 (WA), OR-27679 (WA), and OR-27820 (WA).

Affirmed.

1. Accounts: Refunds--Oil and Gas Leases: Cancellation--Oil and Gas Leases: Relinquishments--Oil and Gas Leases: Rentals--Oil and Gas Leases: Stipulations--Payments: Refunds

   Where BLM has unilaterally imposed special stipulations in issuing oil and gas leases and the lessee accepts such leases without protest for 7-1/2 months, she may not thereafter "withdraw" from or relinquish such leases and recover the annual advance rentals paid therefor on the ground that she did not consent to the imposition of the special stipulations, although she might have been permitted to do so had she protested promptly.

APPEARANCES: Alan L. Sullivan, Esq. and James A. Holtcamp, Esq., Salt Lake City, Utah, for appellant. Mark K. Seifert, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Frances Kunkel filed regular ("over-the-counter=) noncompetitive oil and gas lease offers for certain Washington lands. In response, the Oregon State Office of the Bureau of Land Management (BLM) issued her five oil and gas leases, all effective June 1, 1982. The executed leases contained certain special stipulations to which Kunkel had not consented, and of which she had no prior notice.

Nevertheless, she accepted the leases without protest and held them for more than 7-1/2 months when, on January 20, 1983, she filed what purported to be "withdrawals" of all her "right, title and interest in and to"

the lease "applications" for which these leases had issued, and she requested a refund of all annual advance rentals paid in connection therewith, a total of $38,009. She stated her reason as follows: "I understand that when the applicant was not given the opportunity to see the stipulations before the lease was issued, the IBLA has held that the lessee need not accept the lease."

By its decision of February 9, 1983, BLM "rejected" her "withdrawal" stating:

> The subject leases were signed by the authorized officer on May 7, 1982, and mailed to you shortly thereafter. The leases had been in effect for 7-1/2 months at the time your withdrawal request was received. While the Interior Board of Land Appeals has held that stipulations may not be imposed without the applicant's concurrence, it is expected that the applicant will exercise due diligence and protest any such offensive stipulations in a timely manner (30 days).

From this decision Kunkel has appealed. Essentially, she relies on the decisions of this Board in Emery Energy, Inc., 64 IBLA 175 (1982), and John D. La Rue, 66 IBLA 347 (1982). In those cases we had held that leases issued with additional special stipulations without notice to the offeror were not binding without the offeror's subsequent consent.

Appellant acknowledges that the Board granted a petition for reconsideration of the Emery Energy, Inc. decision, supra, and a companion case, Emery Energy, Inc., 64 IBLA 285 (1982). Our subsequent decision in those cases, Emery Energy, Inc. (On Reconsideration), 67 IBLA 260 (1982), reaffirmed the Board's previous holdings to the effect that when BLM responded to a lease offer by issuing an oil and gas lease incorporating special stipulations to which the offeror had not consented, this, in essence, amounted to a "counter-offer" which the original offeror was free to accept or reject. We then said:

> Counsel for BLM argues that our Emery decisions "result in great confusion by clouding titles to thousands of leases." This is, as pointed out by counsel for Emery, incorrect.
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> If lessees in other cases, however, have not objected to BLM's counter offers, those lessees must be considered to have accepted the counter offers, and the leases have been validly issued. Unless an offeror objects within 30 days of receipt of the counter offer, it must be considered to have accepted the counter offer. Since Emery objected, we were required to examine the procedure. We found it lacking in that it failed to provide proper notice. Our decisions do not affect leases previously issued. The deficiency in BLM's notice procedure is cured when the offeror fails to object timely to imposition of new stipulations. Thus, our decisions in Emery cannot be considered as causing the cataclysmic result ascribed by counsel for BLM.

Id. at 264.

Appellant argues that at the time her leases issued (in May 1982) she had no notice of the time limitation set by Emery Energy (On Reconsideration), which was decided on September 27, 1982, and of which she did not learn until January 1983, whereupon she immediately applied for a refund of rentals.

We must reject this argument. If she believed she was adversely affected by BLM's issuance of the leases with the additional stipulations, she had the 30-day period within which to file a notice of appeal, as provided by 43 CFR 4.411. She had the same recourse as did Emery Energy, Inc., John D. La Rue, and others. She also might have protested timely to BLM that the stipulations were unacceptable and sought to have them expunged. Instead, she did precisely nothing for the better part of a year.

When a lessee has control of oil and gas leases without objection for an extended period, many considerations might motivate that lessee's desire to be rid of them and to recover the money invested in them if possible. Whether this appellant was so motivated is unknown, but she might, during that time, have attempted to find a buyer, only to learn that there was no market for them, or she might have learned something unfavorable concerning the geology which convinced her that it was unlikely that the leases would ever be productive. In any event, she certainly had the opportunity to attempt to profit from these leases, or to evaluate the prospects for their successful development. She did control the ground for oil and gas purposes, and she did prevent the United States from issuing the leases to anyone else. If producing wells had been completed in close proximity to the subject leases during the 7-1/2 month interval while she was quietly holding them, she might have been very happy with her bargain, despite the stipulations. In short, she has enjoyed the opportunity to exercise all of the rights that the leases bestowed.

We conclude that there is no legal or equitable basis for canceling the leases and refunding the rentals. Appellant may relinquish them or refrain from paying the next annual rental, letting them terminate automatically, but the first year's annual rental has been earned by the United States and may not be refunded.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Edward W. Stuebing
Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in agreement with the disposition of the instant appeal, I wish to address the estoppel argument implicit in this appeal, and explicit in other appeals, (see, e.g., William A. Stevenson, 73 IBLA 305 (1983)), that appellant was misled to her eventual detriment by the Board's initial decision in Emery Energy, Inc., 64 IBLA 175 (1982). The estoppel argument proceeds as follows: (a) In early May 1982 appellant receives an oil and gas lease from the Oregon State Office, BLM, with stipulations attached of which she had no prior knowledge and to which she objects; (b) on May 26, 1982, this Board issues its decision in Emery Energy, Inc., supra, wherein the Board holds that such a stipulation is void without the lessee's consent; (c) being made aware of this decision, appellant does nothing in the belief that the stipulation does not apply; (d) on September 27, 1982, the Board issues its decision Emery Energy, Inc. (On Reconsideration), 67 IBLA 260 (1982), where it holds for the first time that a party objecting to such a stipulation must notify BLM of its objection within 30 days of receiving the stipulations to which it objects or consent to the stipulations will be presumed. It now being too late for appellant to object to the stipulation, she suggests that the above scenario shows that, because of her reliance on the Board's initial decision in Emery Energy, she was misled to her detriment by being forced to accept a stipulation to which she objects.

If the facts were as alleged above, I would find myself in substantial agreement with the contention of appellant. The facts, however, are crucially different.

The key error in this argument lies in the analysis of the Board's initial decision in Emery Energy. The Board did not, in any way, suggest that the stipulation was either void or voidable. Rather, it clearly stated that, where a lessee objected to such a stipulation, the lease was voidable, not the stipulation. Thus, the Board expressly held that "the leases issued to the appellant were without effect, in the absence of its consent to the additional stipulations." 64 IBLA at 179 (emphasis supplied).

This being the case, it is clear that a lessee had no reasonable basis for assuming that failure to consent to the stipulation resulted in the effective issuance of the lease without the stipulation. Nothing in Emery Energy even suggested this possibility. Appellant's suggestion that the decision in Emery Energy, in effect, gave her an indefinite time in which to make up her mind as to whether to accept the lease or not is, as the majority points out, similarly lacking in any support in the original decision in Emery Energy. Appellant was the beneficiary of an issued lease for 7-1/2 months during which time she was free to either attempt to assign that lease or to develop it. She either chose not, or was unable, to do either. Rentals are paid on leases for the right to extract minerals. This right was vested in appellant. If, indeed, she interpreted Emery Energy as mandating return of her rentals, it is hard to understand why she did not inquire of BLM as to when her rentals would be returned. I agree with the majority that there is no basis in law or equity for ordering a refund of the rentals which have properly accrued.

James L. Burski
Administrative Judge